Supreme Court, U.S.
FILED
AUG 26 2002
OFFICE OF THE CLERK

No. 02 318

In The Supreme Court of the United States

DENNIS OLIVARES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Fred Warren Bennett
BENNETT & NATHANS, LLP
6301 Ivy Lane, Suite 504
Greenbelt, Maryland 20770
(301) 220-1570

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

56 pp

QUESTION PRESENTED

I. When a defendant entirely serves and discharges the one and only legally valid sentence he received, does the government - after a successful appeal and re-trial - retain the power to punish him further for that crime, or is the government's power to increase the punishment at an end?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

BRIEF SUMMARY OF REASONS FOR GRANTING THE WRIT 5

REASONS FOR GRANTING THE WRIT 6

I. The Court Should Grant Certiorari To Address Inconsistencies In How Federal Circuit Courts Have Interpreted This Court's Double Jeopardy Clause Jurisprudence. 6

II. Because It Is Unique, This Case Presents The Perfect Opportunity For The Court To Resolve Inconsistencies That Have Developed Since *DiFrancesco*. 14

III. This Case Also Provides The Opportunity To Re-examine The Continuing Validity Of Portions Of The Court's Holdings In *Ex Parte Lange* and *In Re Bradley*. 15

CONCLUSION 18

APPENDIX

Decision of the Court of Appeals for the Fourth Circuit 1

Report and Recommendation of the U.S. District Court for the District of Maryland . . . 11

Amended Order of the U.S. District Court for the District of Maryland 28

TABLE OF CASES, STATUTES, AND AUTHORITIES

CASE LAW

Alabama v. Smith, 490 U.S. 794 (1989) 6

Burks v. United States, 437 U.S. 1 (1978) 8

Ex Parte Lange, 85 U.S. 163 (1873) 11,15-17

Gardiner v. United States,
114 F.3d 734 (8th Cir. 1997) 10

In re Bradley, 318 U.S. 50 (1943) 8, 12,15,16

Jones v. Thomas, 491 U.S. 376 (1989) 16,17

North Carolina v. Pearce,
395 U.S. 711 (1969) 5-9, 13,17

Pasquarille v. United States,
130 F.3d 1220 (6th Cir. 1997) 10,12

Pennsylvania v. Goldhammer,
474 U.S. 28 (1985) 13

United States v. Arrellano-Rios,
799 F.2d 520 (9th Cir. 1986) 10,11

United States v. Bello,
767 F.2d 1065 (4th Cir. 1985) 10

United States v. Benbrook,
119 F.3d 338 (5th Cir. 1997) 10,12

United States v. Jones,
722 F.2d 632 (11th Cir. 1983) 10

United States v. Daddino,
5 F.3d 262 (7th Cir. 1993) 10,11

United States v. DiFrancesco,
449 U.S. 117 (1980) 5, 9-10,12-14,16,17

United States v. Murray,
144 F.3d 270 (3d Cir. 1998) 10,12

United States v. Olivares,
292 F.3d 196 (4th Cir. 2002) 2,10,13,14,17

United States v. Rodriguez,
112 F.3d 26 (1st Cir. 1997) 10,11,14

United States v. Rourke,
984 F.2d 1063 (10th Cir. 1992) 10,12

United States v. Silvers,
90 F.3d 95 (4th Cir. 1996) 11

United States v. Smith,
115 F.3d 241 (4th Cir. 1997) 11, 14

United States v. Townsend,
178 F.3d 558 (D.C. Cir. 1999) 10

United States v. Triestman,
178 F.3d 624 (2d Cir. 1999) 10

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Amendment V 2

18 U.S.C. § 113(a)(4) 3

28 U.S.C. § 1254(1) 2

28 U.S.C. §2253(c)(1)(b) 2,5

28 U.S.C. § 2255 ..... 1, 2, 4

Docket No. _____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 2001

DENNIS OLIVARES,
PETITIONER,

V.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the United States District Court for the District of Maryland resolving Mr. Olivares' Motion To Vacate his sentence pursuant to 28 U.S.C. § 2255 was rendered on the district judge's adoption of the Report and Recommendation of United States Magistrate Judge Charles B. Day, and is not officially reported. The Report and Recommendation of Magistrate Judge Day in Case Number AW 99-0296 appears in the Appendix at pages 11-27, and the district judge's Order adopting that Report

and Recommendation appears in the Appendix at pages 28-30. After denying Mr. Olivares' § 2255 Motion, the district court granted a certificate of appealability, pursuant to § 2253(c)(1)(B). The opinion of the United States Court of Appeals for the Fourth Circuit on direct review of the denial of Mr. Olivares' § 2255 Motion is reported at *United States v. Olivares*, 292 F.3d 196 (4th Cir. 2002), and is attached in the Appendix at pages 1-10.

JURISDICTION

The Fourth Circuit entered a decision and order affirming Mr. Olivares' conviction on May 28, 2002. (App. 1). This Court has jurisdiction to review the order of the Fourth Circuit on writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process

of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

This case involves the misdemeanor crime of simple assault. United States Magistrate Judge Victor H. Laws, III, originally found Mr. Olivares guilty of violating 18 U.S.C. § 113(a)(4) (Case No. M-98-2476) and sentenced Mr. Olivares on July 14, 1999. Mr. Olivares was sentenced to a fine of $500.00, a special assessment of $10.00, and unsupervised administrative probation through payment of the fine. (App. 2). Mr. Olivares paid the fine and special assessment that same day, on July 14, 1999. (App. 2). As of July 14, 1999, Mr. Olivares served and discharged the full sentence for his alleged role in the crime of simple assault.

Mr. Olivares thereafter filed a Notice of Appeal, five days later, on July 19, 1999. (App. 2). On September 15, 1999, the district court vacated the judgment of conviction and sentence and granted Mr. Olivares a new trial. (App. 12-13). Although his conviction was vacated, Mr. Olivares' full sentence was already served and his original fine was not returned by the Government.

Later in 1999, following a bench trial, United States Magistrate Judge Charles B. Day found Mr. Olivares guilty of the same offense for which Mr. Olivares was previously convicted. (App. 13). Notwithstanding his prior sentence of a $500 fine, which remained entirely served, on December 1, 1999, Magistrate Judge Day

sentenced Mr. Olivares to a completely new and stiffer sentence including, *inter alia*, 12 months of supervised probation. (App. 13-14).

Mr. Olivares immediately began serving his second harsher sentence, which was effectively placed on top of Mr. Olivares' first discharged sentence that remained fully served. On July 17, 2000, a Notice of Violation of Probation was filed and on October 5, 2000, Mr. Olivares was found to be in violation of his probation. (App. 3). The district court ordered Mr. Olivares to continue probation until December 3, 2001, and as an additional sanction, Mr. Olivares was ordered to satisfactorily complete a thirty (30) day period of confinement with work release at a community corrections facility. (App. 3). Mr. Olivares remains under the jurisdiction of the district court to this day, awaiting resolution of a pending Violation of Probation hearing.

On March 19, 2001, pursuant to 28 U.S.C. § 2255, Mr. Olivares filed a Motion to Vacate Sentence with Memorandum of Law. (App. 11). On March 27, 2001, Magistrate Judge Day filed a Report and Recommendation granting relief in part (ordering a refund to Mr. Olivares of $200.00 paid as part of the fine imposed in this case) and denying relief in part (denying Mr. Olivares' claim that the double jeopardy clause prohibited the increased punishment after Mr. Olivares' second trial). (App. 26-27). On June 13, 2001, United States District Judge Alexander Williams, Jr., issued an Order adopting the

Report and Recommendation in toto.[1] (App. 28-30). Thereafter, Judge Williams granted Mr. Olivares a Certificate of Appealability to the U.S. Court of Appeals for the Fourth Circuit, pursuant to § 2253(c)(1)(B), so that court could determine whether Mr. Olivares' rights under the Double Jeopardy Clause were violated. On May 28, 2002, the Fourth Circuit issued a published opinion denying the requested relief. (App. 1-10).

BRIEF SUMMARY OF REASONS FOR GRANTING THE WRIT

According to the Fourth Circuit in this case, the Double Jeopardy Clause is never implicated when an individual is reconvicted and resentenced after his original conviction has been vacated. (App. 9-10) (Michael, J., concurring separately). It does not matter that the defendant has fully served and discharged his entire sentence prior to having the sentence vacated. In reaching this decision, that court did not follow this Court's precedent in *United States v. DiFrancesco*, 449 U.S. 117, 139 (1980), and instead relied on an overly broad interpretation of *North Carolina v.*

---

[1] United States District Judge Alexander Williams, Jr., adopted the Report and Recommendation issued by United States Magistrate Judge Charles B. Day. Judge Williams did not issue a separate opinion. Therefore, upon adopting of the Report and Recommendation, the Report and Recommendation became the official and only opinion of the district court. Hereinafter, Mr. Olivares will refer to the Report and Recommendation as the action of the "district court."

Pearce, 395 U.S. 711, 720 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989).

Mr. Olivares believes that the multiple punishment protections in the Double Jeopardy Clause are violated when a defendant fully serves and discharges one legally valid sentence, then is sentenced to a harsher penalty for the same crime following a second trial or proceeding. Whether the first conviction is vacated or not is of no import once the original legally valid sentence imposed for that first conviction is discharged in full. By discharging the entire sentence, the individual has achieved finality of punishment, and the Double Jeopardy Clause steps in to prevent a subsequent enhanced sentence on that same charge.

To resolve this case, the Fourth Circuit clung to "conceptual niceties" and "unmitigated fictions." A better foundation is needed. By granting certiorari, the Court can provide the guidance that circuit courts need to assist in determining the proper scope of the Double Jeopardy Clause's bar on multiple punishments.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant Certiorari To Address Inconsistencies In How Federal Circuit Courts Have Interpreted This Court's Double Jeopardy Clause Jurisprudence.

In *North Carolina v. Pearce*, 395 U.S. 711, 720 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S.

794 (1989), this Court explained that the Double Jeopardy Clause places no limit on our government's power to retry a defendant who has succeeded in getting his first conviction set aside. Regarding re-trial and re-conviction, this Court explained in *Pearce* that a court "may impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction." *Id.* As the Court stated in *Pearce*, once the first conviction is set aside the slate is wiped clean. *Id.*

Despite the language in *Pearce* cited above, the two defendants in *Pearce* were only in the early stages of their sentences when they succeeded in having their convictions set aside. (App. 10). This Court explained in *Pearce* that because each defendant did serve some time, it was an "unmitigated fiction" to say that the proverbial slate is truly clean. *Id.* at 721. However, "so far as the conviction goes, and *that part of the sentence that has not yet been served*, it is no more than a simple statement of fact to say that the slate has been wiped clean." *Id.* (emphasis added). That is because "the unexpired portion of the sentence will never be served." *Id.* In *Pearce*, the "unexpired portion of the sentence" was the overwhelming majority of the sentence for both defendants. (App. 10).

Building on *Pearce*, the question presented here is whether *Pearce* foreclosed the possibility that the multiple punishment protections in the Double Jeopardy Clause can ever be implicated when a defendant is tried a second time on the same charges after his first conviction is vacated. Mr. Olivares contends that there are two situations when the Double Jeopardy Clause does limit the government's

power to reconvict and resentence after an initial conviction and sentence is vacated. First, when the original and only conviction is overturned based on insufficiency of the evidence. *See Burks v. United States*, 437 U.S. 1, 11 (1978). Second, when the first and only sentence is served in full and discharged prior to it being vacated. After a defendant discharges one entire legally valid sentence in full, the government's power to extract more punishment for that offense is at an end.[2] *Cf. In re Bradley*, 318 U.S. 50, 63 (1943) (holding that when defendant paid his fine in full 3 days after sentencing, he achieved "full satisfaction" of one lawfully imposed penalty, and therefore the judgment was executed and the power of the court to punish further "was at an end").

Contrary to the holding of the Fourth Circuit in this case, Mr. Olivares respectfully submits that *Pearce* left open the question of whether the Double Jeopardy Clause limits a court's power to resentence with a stiffer penalty after a second conviction, when there is no "unexpired portion of the sentence."

After *Pearce*, at least one question remained: is there a time – before a defendant completely serves his entire sentence – when enough of the sentence has been served

---

[2] Aside from the Double Jeopardy Clause, there are other constitutional provisions that do limit the government's power to reconvict and resentence following a successful appeal. For instance, due process of law protects against vindictiveness playing any part in sentencing a defendant who successfully challenged his first conviction. *See Pearce*, 395 U.S. at 725.

so that the Double Jeopardy Clause attaches to prevent enhanced resentencing? This Court addressed that question in *United States v. DiFrancesco*, 449 U.S. 117, 139 (1980). In *DiFrancesco*, this Court discussed issues at the opposite end of the spectrum from those presented here. *DiFrancesco* addressed whether the pronouncement of a sentence alone is sufficient to provide a defendant with double jeopardy protections that would prevent a subsequent increase in the sentence. *DiFrancesco*, 449 U.S. at 137-38. Unlike *DiFrancesco*, here we are concerned not with the pronouncement of a sentence, but with the completion of a sentence. Discussing *Pearce*, the Court in *DiFrancesco* explained that "if any rule of finality had applied to the pronouncement of a sentence, the original sentence in *Pearce* would have served as a ceiling on the one imposed at re-trial." *Id.* at 135. But the question remained: is there a rule of finality that attaches to the complete execution of a sentence? *DiFrancesco* did not answer that question directly. Instead, the Court indicated that the key to determining whether double jeopardy attaches so as to prevent enhanced re-sentencing the second time around is to decide whether a legitimate expectation of finality exists in the sentence. *Id.* at 139. The decision in *DiFrancesco* supposes that while the Double Jeopardy Clause does not absolutely bar the possibility of ever sentencing a defendant to a more severe sentence the second time around, there may be a situation when the Double Jeopardy Clause would prevent enhanced resentencing.

Since *DiFrancesco*, it has been left largely to the federal circuit courts to determine when a legitimate expectation of finality in a sentence arises for double jeopardy purposes. Although this Court never expressly developed a "test" referencing a "legitimate expectation of finality" in *DiFrancesco*, every federal circuit court following that decision has cited to *DiFrancesco* as introducing the "expectation of finality" analysis.[3] Within this framework, the circuit courts have at least reached a consensus that if a legitimate or reasonable expectation of finality develops in an initial sentence, then the double jeopardy clause will act to prevent a court from having the power to later enhance that sentence. That is until now. According to *Olivares*, it does not matter whether a defendant acquired a legitimate expectation of finality, or even actual finality. If the sentence is later vacated for whatever reason, even if finality is achieved, the trial court can resentence to a stiffer sentence without implicating double jeopardy. (App. 9).

---

[3] *See United States v. Triestman*, 178 F.3d 624, 630 (2d Cir. 1999); *United States v. Townsend*, 178 F.3d 558, 566 (D.C. Cir. 1999); *United States v. Murray*, 144 F.3d 270, 275 (3d Cir. 1998); *Pasquarille v. United States*, 130 F.3d 1220, 1222 (6th Cir. 1997); *United States v. Benbrook*, 119 F.3d 338, 340 (5th Cir. 1997); *Gardiner v. United States*, 114 F.3d 734, 736 (8th Cir. 1997); *United States v. Rodreguiez*, 112 F.3d 26, 31-32 (1st Cir. 1997); *United States v. Daddino*, 5 F.3d 262, 265 (7th Cir. 1993); *United States v. Rourke*, 984 F.2d 1063, 1066 (10th Cir. 1992); *United States v. Arrellano-Rios*, 799 F.2d 520, 524-25 (9th Cir. 1986); *United States v. Bello*, 767 F.2d 1065, 1070 (4th Cir. 1985); *United States v. Jones*, 722 F.2d 632, 637 (11th Cir. 1983).

Some circuits have concluded that an "expectation of finality" exists once actual finality is achieved by fully discharging a sentence. *See United States v. Silvers*,[4] 90 F.3d 95, 101 (4th Cir. 1996) (holding that "once a defendant fully serves a sentence for a particular crime, the Double Jeopardy Clause's bar on multiple punishments prevents any attempt to increase thereafter a sentence for that crime"); *United States v. Daddino*, 5 F.3d 262, 265 (7th Cir. 1993) (holding that defendant acquired a legitimate expectation of finality in his incarceration, fines and restitution when the second sentencing occurred after defendant had completed period of incarceration and paid all fines and restitution in full); *United States v. Arrellano-Rios*, 799 F.2d 520, 524-25 (9th Cir. 1986) (holding that "we are certain, however, that the

---

4 Prior to the instant case, the Fourth Circuit held in the most absolute terms possible that when one legally valid sentence is discharged in full, double jeopardy prevents subsequent enhanced resentencing. *See, e.g., United States v. Smith*, 115 F.3d 241, 246 (4th Cir. 1997) (stating that "[n]o doubt exists under the court's decision in *Silvers* if a defendant has fully discharged his sentence pertaining to certain counts, he may not be resentenced on those counts"). Here, the court reconciled this holding with those in *Silvers* and *Smith* by limiting those cases to situations where the "fully served" sentence was not later vacated. While Mr. Olivares understands this limitation, he respectfully submits that jurisprudence in this area, at least as far back as *Ex Parte Lange*, 85 U.S. 163 (1873), suggests that the important fact is not whether the sentence was ultimately vacated, but whether or not it was fully served.

expectation has arisen, and jeopardy has attached, upon . . . [the sentence's] completion"); *see also United States v. Rodriguez*, 112 F.3d 26, 31-32 (1st Cir. 1997) (rejecting double jeopardy claim but specifically limiting the holding by stating that "this case does not involve a petitioner who had already fully discharged his sentence"). In other words, once a sentence is served in full and discharged, any "expectation" of finality gives way to actual finality, and the Double Jeopardy Clause bars subsequent enhanced re-sentencing.

Instead of looking at the end of a defendant's sentence, other circuits have asked whether an "expectation of finality" can develop near the beginning of a sentence. These circuit courts have decided that if a defendant's appeals are still pending, there can be no "expectation of finality," and consequently no double jeopardy protection. *See, e.g., Pasquarille v. United States*, 130 F.3d 1220, 1222 (6th Cir. 1997) (no expectation of finality when defendant challenges sentence); *United States v. Benbrook*, 119 F.3d 338, 390 (5th Cir. 1997) (same); *United States v. Rourke*, 984 F.2d 1063, 1066 (10th Cir. 1992) (same); *United States v. Murray*, 144 F.3d 270, 275 (3d Cir. 1998) (same); *but see In re Bradley*, 318 U.S. at 63 (holding prior to *DiFrancesco* that a court's power to punish was "at an end" only 3 days after sentencing, when period for filing appeal had not run, because the defendant paid his fine in full, thereby satisfying one valid legal punishment).

This case provides the Court with an opportunity to find consistency between these two extremes. Here, there is no dispute that Mr. Olivares did execute and completely

discharge one legally valid punishment before he ever filed an appeal. (App. 2). As such, arguably the power of the court to punish further was at an end. But, after discharging his sentence in full, Mr. Olivares challenged the validity of his conviction. (App. 2). Did that decision give the district court back the power it lost when Mr. Olivares fully discharged the only legally valid sentence he received?

In *Olivares*, the Fourth Circuit avoided the question entirely, by holding that because Mr. Olivares' initial sentence was vacated, it did not matter whether he served the sentence entirely or not. (App. 8-9). In so doing, the Fourth Circuit danced around *DiFrancesco* by claiming that the "expectation of finality" analysis should not be used when a conviction is vacated. (App. 8-9). The rational is that while *DiFrancesco* addresses re-sentencing after appeal, it is *Pearce* that controls the issue of re-sentencing after re-trial. Of all the circuit court decisions presented above, this is the most troubling as it overlooks this Court's unequivocal statement in *DiFrancesco* that: "While *Pearce* dealt with the imposition of a new sentence after retrial rather than, as here, after appeal, that difference is no more than a 'conceptual niceity.'" *Id.* (quoting from *Pearce*); *see also Pennsylvania v. Goldhammer*, 474 U.S. 28, 30 (1985) (*per curiam*) (quoting the same passage again).

If the opinion in *Olivares* is correct, then absurd results follow. Imagine a defendant who receives a 50 year sentence for murder. After fully serving all 50 years, he files a Writ of Error Coram Nobis to relieve himself of

the collateral consequences associated with his conviction. He prevails and the conviction is vacated. According to *Olivares*, the slate is wiped clean and - assuming no vindictiveness - the State is free to re-try, re-convict, and re-sentence to the statutory maximum, including life in prison. Notwithstanding *Olivares*, it is difficult to imagine that many agree this person who served all 50 years was truly given a clean slate.

II. Because It Is Unique, This Case Presents The Perfect Opportunity For The Court To Resolve The Inconsistencies That Have Developed Since *DiFrancesco*.

This is a unique case. Because Mr. Olivares' first sentence consisted of a monetary fine, he was able to serve the entire sentence prior to ever filing his appeal. On direct appeal, the court vacated his conviction, and gave him a new trial, but kept his money. After re-trial, Mr. Olivares received a harsher sentence than he did the first time through.

The unique nature of this case provides the opportunity to correct inconsistencies between federal circuit court interpretations of the scope of the Double Jeopardy Clause. There are published appellate decisions explaining that no doubt exists that once a defendant fully serves a sentence for a particular crime, the Double Jeopardy Clause's bar on multiple punishments prevents any attempt to increase thereafter a sentence for that crime. *See Smith*, 115 F.3d at 246. But other published decisions

explain that there can be no double jeopardy clause protection from multiple punishments while a defendant's appeals are pending. While the first set of decisions focus on the objective issue of "actual finality," the other decisions focus on the subjective nature of the reasonableness of a defendant's expectations. By granting a Writ of Certiorari in this case, the Court can provide needed guidance to the lower courts that are struggling with the scope of the Double Jeopardy Clause's bar on multiple punishments.

III. This Case Also Provides The Opportunity To Re-examine The Continuing Validity Of Portions Of The Court's Holdings In *Ex Parte Lange* and *In Re Bradley*.

In *Ex Parte Lange*, 85 U.S. 163 (1873), the Court discussed the origins of our Double Jeopardy Clause jurisprudence. Part of that discussion included Sargent Hawkins' interpretation of the Latin, "*Nemo bis punitur pro eodem delicto*," as stating "No one can be twice punished for the same crime or misdemeanor." *Lange*, 85 U.S. at 169 (quoting 2 Hawkins's Pleas of the Crown, 377). Parenthetically, there is no mention in *Lange* of an exception to this principal based on Aristotle's *tabula rasa*.

Lange involved facts different from the instant case. Nonetheless, in *Lange* this Court stated that when a prisoner, by reason of a valid judgement "fully suffered one of the alternative punishments to which alone the law

subjected him, the power of the court to punish further was gone." *Lange*, 85 U.S. at 176. The focus in *Lange* appeared to be that once a defendant was "fully punished," – past tense – the power of the court was at an end. Seventy years later, this Court decided *In Re Bradley* on essentially the same analysis developed in *Lange*. *See In Re Bradley*, 318 U.S. at 63.

In *DiFrancesco* the Court divided 5-4 and the majority's opinion severely restricted the holding in *Lange*. *DiFrancesco*, 449 U.S. at 140. Since then, the continuing validity of any precedent in *Lange* beyond its narrow facts is disputed. (App. 18). Nonetheless, in *Jones v. Thomas*, 491 U.S. 376 (1989), Justice Scalia wrote for a four Justice dissent and cited frequently to *Ex Parte Lange* and *In Re Bradley* without mentioning any broad limitation of those precedents. *Thomas*, 491 U.S. at 388-91. Justices Stevens, Brennan and Marshall, who joined Justice Scalia in *Thomas*, also dissented in *DiFrancesco*. Admittedly, the facts in *Thomas* are much closer to those in *Lange* and *Bradley* than they are to the facts here. But the principals relied on by the four Justice dissent in *Thomas* support Mr. Olivares' position here. For instance, the dissent in *Thomas* directly challenged the Court's statement there that in the multiple punishments context, "'the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.'" *Thomas*, 491 U.S. at 392 (dissenting opinion). This language in *Thomas*, strongly challenged by the dissent, is the same exact language that the Fourth Circuit repeatedly relied on here in rejecting Mr. Olivares' double jeopardy challenge. (App. 4, 6, 8).

This Court's decisions in *DiFrancesco* and *Thomas* indicate considerable disagreement exists within the Court concerning the scope of double jeopardy protections in the context of multiple punishments. The different approaches taken by the majority and the dissent in *DiFrancesco* and *Thomas* also suggests that there is disagreement over exactly how much of the Court's thinking in *Ex Parte Lange* survived *DiFrancesco*.

Some of these same differences in thinking about the scope of our constitutional protections appeared in *Olivares*. Here, two of three judges from the Fourth Circuit relied on the most restrictive interpretations of the Double Jeopardy Clause in *Thomas* to avoid *DiFrancesco* altogether and narrow the scope of the Double Jeopardy Clause. (App. 8-9). In a concurring opinion, Judge Michael agreed with the outcome, but did not endorse the overly broad use of language in *Pearce* and *Thomas* to undercut the application of *DiFrancesco*. (App. 9-10).

The Court should grant certiorari to provide further guidance on the scope of the protections against multiple punishments in the Double Jeopardy Clause. The vigorous debate on this issue within the Court indicates that the issue is alive. The Fourth Circuit's inability to reach consensus, along with the different approaches taken by the other circuits mentioned earlier, suggests that the assistance of this Court would be beneficial.

CONCLUSION

Petitioner respectfully requests that this Court grant his Petition.

Respectfully Submitted,

Fred Warren Bennett
BENNETT & NATHANS LLP
6301 Ivy Lane, Suite 504
Greenbelt, Maryland 20770
301.220.1570